84-1861

No.

Office - Supreme Court, U.S.
FILED
MAY 23 1985
ALEXANDER L. STEVAS.
CLERK

In The

Supreme Court of the United States

October Term, 1984

PETER WIVORKOSKI,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

2200
Int's Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTIONS PRESENTED

1. Whether petitioner's rights under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution were violated by the fact that the evidence in the case at bar is so threadbare as to constitute no case at all?

2. Whether petitioner was deprived of a fair trial when the court denied a mistrial and allowed the adduction of evidence concerning alleged acts of prior misconduct on the part of petitioner?

3. Whether any rational trier of fact could have found guilt beyond a reasonable doubt in view of the dearth of evidence in this case? (Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781).

PARTIES

The parties below were the petitioner, Peter Wivorkoski and the Commonwealth of Pennsylvania.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Parties.....	ii
Table of Contents.....	iii
Table of Citations.....	iv
Opinion Below.....	1
Jurisdiction.....	2
Constitutional and Statutory Provisions Involved.....	4
Statement of the Case.....	4
Reasons for Granting the Writ:	
I. The petitioner herein was convicted in the Pennsylvania courts upon insufficient evidence to have warranted and justified a rational trier of the facts to find guilt beyond a reasonable doubt. We maintain this to be true, even according and viewing the evidence in the light most favorable to the Commonwealth.	13

Contents

Page

II. Error was created and prejudice flowed to the petitioner when the trial court permitted the introduction of evidence as to an alleged other crime which had absolutely nothing to do with the charges herein and against which the petitioner had no right or opportunity to defend properly. 26

Conclusion..... 30

TABLE OF CITATIONS

Cases Cited:

Adderley v. Florida, 385 U.S. 39, 17 L. Ed. 2d 149..... 29

Bronston v. United States, 409 U.S. 352, 34 L. Ed. 2d 568..... 23

Blackburn v. Alabama, 361 U.S. 199, 4 L. Ed. 2d 242..... 24

Brown v. Allen, 344 U.S. 443..... 24

Cole v. Arkansas, 333 U.S. 196, 92 L. Ed. 644 28

Contents

Page

Commonwealth v. Rose, 463 Pa. 264, 344 A.2d 824 (1975)..... 15

Cool v. United States, 409 U.S. 100.. 21

Curley v. United States, D.C. Cir., 160 F.2d 229..... 23

Douglas v. Buder, 412 U.S. 430, 37 L. Ed.2d 52..... 30

Drope v. Missouri, 420 U.S. 162, n. 10, 43 L. Ed. 2d 103..... 24

Freeman v. Zahradnick, 429 U.S. 111, 51 L. Ed. 2d 566, 97 S. Ct. 1050.. 16

Glasser v. United States,315 U.S. 60, 86 L. Ed.680..... 23

Gregory v. Chicago, 394 U.S. 111, 22 L. Ed. 2d 134..... 30

In Re Winship, 397 U.S. 358, 25 L. Ed. 368, 90 S.Ct. 1068..... ..... 16, 17, 20, 21, 22, 23, 24

Ivan v. City of New York, 407 U.S. 203..... 21

Jackson v. Virginia, 433 U.S. 307, 61 L. Ed.2d 560, 99 S. Ct. 2781..... ..... passim

Contents

Page

Johnson v. Louisiana, 406 U.S. 356, 32 L. Ed. 2d 152..... 22, 25

Lego v. Twomey, 404 U.S. 477..... 21

Mullaney v. Wilbur, 421 U.S. 684.... 21

Patterson v. New York, 432 U.S. 197. 21

Presnell v. Georgia, 439 U.S. 14, 58 L. Ed. 2d 207..... 28

Thompson v. Louisville, 362 U.S. 199, 4 L. Ed.2d 654, 80 A.L.R. 2d 1355. ..... 15, 16, 17

Townsend v. Sain, 372 U.S. 293, 9 L. Ed. 2d 770..... 24

Vachon v. New Hampshire, 414 U.S. 478, 38 L. Ed. 2d 666..... 29

Statutes Cited:

18 P.S. §3126(1)..... 2

18 P.S. §3127..... 2

18 P.S. §6301(a)..... 2

28 U.S.C. §§1254 and 1257..... 3

Contents

Page

United States Constitution Cited:

Fifth Amendment..... i, 4

Fourteenth Amendment..... i, 4, 23

APPENDIX

Order Denying Leave to Appeal..... 1a

Judgment Dated October 12, 1984..... 2a

Memorandum Opinion..... 4a

Opinion and Order Dated April 15, 1983..... 6a

In The
SUPREME COURT OF THE UNITED STATES

October Term 1984

PETER WIVORKOSKI,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA

OPINION BELOW

The opinion of the Superior Court of Pennsylvania, filed October 12, 1984, is annexed hereto and made a part hereof. The memorandum order of the Supreme Court of the State of Pennsylvania, Eastern District, denying allowance of appeal, and dated March 29, 1985, is also annexed hereto and made a part hereof.

JURISDICTION

A. The petitioner was tried in the Court of Common Pleas, Criminal Division, Monroe County, Pennsylvania (No.79-1982), and was convicted of two counts of corruption of a minor, indecent assault, and one count of involuntary deviate sexual intercourse. Petitioner was sentenced to 3 to 23 months imprisonment.

The petitioner was convicted under sections 3126(1) of the Pennsylvania Crimes Code [18 P.S. 3126(1); 18 P.S. 6301(a); 18 P.S. 3127; and 18 P.S. 6301(a)], after trial before Honorable James R. Marsh, president judge, and a jury.

The petitioner maintained that the evidence was insufficient to have warranted submitting this case to a jury and that, in any event, it was insufficient to have war-

ranted any jury returning a verdict of guilty beyond a reasonable doubt. In addition, petitioner maintains that certain evidentiary rulings of the president judge were prejudicial in that it permitted the adduction of evidence of prior misconduct on behalf of the petitioner, which was totally irrelevant and improper under the circumstances.

B. The petitioner applied for permission to appeal to the Supreme Court of Pennsylvania, Eastern District, but on March 29, 1985 an order was entered denying that permission.

C. The jurisdiction to review the judgment and order in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendment of the United States Constitution are involved herein.

STATEMENT OF THE CASE

Three families are concerned in the factual background of this case, namely the Burneys, the Gutierrezes, and the Wivorkokoskis, who had been friends for many years. They had been visiting each other regularly over the period of time that they knew each other.

During the week of August 10th through 16th of 1981, the Wivorkoskis, that is Mr. and Mrs. Wivorkoski, were staying at the Gutierrez house in Saylorsburg, Pennsylvania.

Greg Gutierrez, the twelve year old son of the Gutierrez family, testified that each night that week, petitioner herein had

entered his room and played with (Greg's) penis (N.T.35-38). Greg further declared that he asked the defendant-petitioner to stop, but Wivorkoski went ahead anyway.

During the last week in August, petitioner Wivorkoski stayed at the Burney house in Brodheadsville. Todd Burney, who was the twelve year old son of the Burneys, testified that on one occasion during this visit the petitioner took him into one of the bathrooms, took off Todd's pants, and had oral sex with him and them played with his penis (N.T.69-72).

During the same week, petitioner took Greg, Todd and a couple of other youths to the movies in Stroudsburg twice. On each of these occasions, while in the car, petitioner and his own son allegedly showed the boys obscene books and magazines (N.T.40-42,

77-81).

Greg showed substantial confusion about the dates when the alleged incidents occurred.

In both instances, it should be noted, that a considerable period of time elapsed before any complaint was made about the alleged incidents. As a matter of fact, Greg, one of the alleged victims, voluntarily went back to spend a week at the petitioner's home in Yonkers after the alleged incidents had occurred. In addition, he also went to the movies with petitioner.

The other youth, Todd, declared that he could not even remember whether defendant-petitioner was clothed or naked when the alleged oral sex occurred.

Ariene Gutierrez, the mother of Greg, testified that she had known the petitioner

and his family for about twenty years, and that she also knew the Burney family, which was that of the other alleged victim, Todd Burney. It had been customary for the families to socialize with each other at parties, children's birthdays, holidays, and so forth.

It must be noted that Arlene Gutierrez testified that her son Greg and young Peter, namely the son of the petitioner himself, slept in the same bedroom, one on a bed and the other on a cot. Thus, we maintain it is inconceivable that the petitioner would have done anything to Greg with his own son in the same room at the same time (26-28).

Furthermore, this contradicted her own son's testimony. The alleged sexual contact was, according to Greg, that the petitioner masturbated him, at least one time

to the point of orgasm (36-38).

Greg admitted, on cross examination, that he had told Sgt. Werts of the State Police, that the petitioner had fondled him six months prior to the alleged incident herein. He also admitted that he discussed this incident with Todd Burney, his friend (50-56).

Todd Burney, the other alleged victim, testified that on one occasion the petitioner had taken him to the bathroom when he was staying at the Burney house and had placed his mouth on Todd's penis, but that he had no ejaculation, although later he claimed that the petitioner had masturbated him (68-71).

He was unable to remember whether the petitioner was naked or dressed during this alleged incident. Admittedly, nothing was

said until he told Arlene Gutierrez about the incident in September.

Todd declared, contradicting Greg, that he never had a conversation with Greg about the incident. Greg merely said, on one occasion, that the petitioner was weird (86).

Trooper Robert Werts, a criminal investigator for the State Police, testified that he investigated the complaints of the boys. The complaints, however, were not received until September of 1981. He further contradicted Todd Burney by admitting that this young man never told him anything about being shown pornographic magazines or the like.

Diana Wivorkoski, petitioner's wife, testified that they visited the Gutierrez family the second week in August, staying there from the 10th through the 16th. She declared

that she and the petitioner slept on a convertible couch in the living room (102-104). She declared that it was customary for her husband to sleep naked, but that when he was visiting people he would sleep in jockey shorts (104). This contradicted the complaining witnesses who stated that petitioner wore pajamas.

She stated that she usually read until 2:00 or 3:00 A.M., after defendant was already asleep, and that she observed nothing untoward (105).

Moreover, she stated that Peter, her own son, slept on a cot in Greg Gutierrez's room. This was until Wednesday. Thereafter they slept in the same bed, since the cot collapsed due to the boys' horseplay (106).

Furthermore, she declared her husband was a very sound sleeper (106-107).

They left the Gutierrez home on August 16th and took Greg with them back to Yonkers. No complaint was revealed to them until mid-September, when two police officers came to the house and arrested the petitioner (108).

Peter Wivorkoski, Jr. also testified on his father's behalf and corroborated the petitioner's wife's testimony concerning the collapsing of the cot and that his father only wore jockey shorts and not pajamas.

Furthermore, he declared that at no time did he recall his father ever coming into the room while he was there with Greg. Moreover he declared that his father generally fell asleep before his mother (118-120).

The defendant-petitioner took the stand in his own behalf and denied categorically the charges against him.

Petitioner declared that he was on total disability and could not work due to a bad back problem from which he suffered (127-128). He was confronted by an allegation that he had been doing aluminum siding work during the past summer (127-128).

This question precipitated a motion for a mistrial and, of course, an objection, by defense counsel, on relevancy grounds.

The court permitted the prosecutor to call Gerard Burney to testify in rebuttal that he had seen petitioner doing aluminum siding work within the past year. The motion for a mistrial was denied (128-131).

The jury was instructed that Gerard Burney's testimony went to credibility only (132).

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER HEREIN WAS CONVICTED IN THE PENNSYLVANIA COURTS UPON INSUFFICIENT EVIDENCE TO HAVE WARRANTED AND JUSTIFIED A RATIONAL TRIER OF THE FACTS TO FIND GUILT BEYOND A REASONABLE DOUBT. WE MAINTAIN THIS TO BE TRUE, EVEN ACCORDING AND VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH.

The only witnesses testifying against the defendant-petitioner herein were two twelve-year old children named Todd Burney and Greg Gutierrez. These children witnesses were inconsistent between themselves in many important aspects of their testimony. We have previously detailed these inconsistencies, to some extent.

But, even more so, is their testimony insufficient when viewed in the light of the evidence adduced by the wife and son of

the petitioner himself?

In the case of Greg, for example, petitioner's own son slept in the same room and, for a period of time, in the same bed as Greg. We submit that it is inconceivable that the petitioner committed the crime alleged, when his own son was in the room and in the same bed as the complainant, Greg Gutierrez.

Furthermore, the wife of the petitioner herein testified that she went to sleep consistently later than he did, and that at a point in time when the alleged crimes took place, she was still awake and could attest to the fact that her husband could not have committed the crime.

Additionally, petitioner's own son gave the lie to the testimony adduced against his father.

Even under the Commonwealth's own definition of sufficiency, we maintain that the evidence fails to reach that standard. Thus, in Commonwealth v. Rose, 463 Pa. 264, 344 A. 2d 824 (1975), the high court of Pennsylvania explained:

> "The test of sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth and drawing the proper inferences favorable to the Commonwealth, the Trier of Fact could reasonably have found that all of the elements of the crime had been established beyond a reasonable doubt."

Years ago the criterion for determining whether a state conviction could stand up against federal scrutiny, as to sufficiency, the criterion was epitomized by the case of Thompson v. Louisville, 362 U.S. 199, 4 L.

Ed. 2d 654, 80 A.L.R. 2d 1355, where the question was whether "any evidence" existed to sustain the conviction. The so-called "no evidence" test of Thompson v. Louisville, supra, has now been overruled by this Court.

Under the case of In Re Winship, 397 U.S. 358, 25 L. Ed. 368, 90 S. Ct. 1068, the criterion of federal review of sufficiency of evidence in the state court is no longer whether there is "any evidence", but rather whether there is sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt. (Freeman v. Zahradnick, 429 U.S. 1111, 51 L. Ed. 2d 566, 97 S. Ct. 1050).

In the relatively recent case of Jackson v. Virginia, 433 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781, the Supreme Court, once and for all, confirmed the constitutional

requirement of the Fourteenth Amendment to be that "...whether there was sufficient evidence to justify a rational Trier of the Facts to find guilt beyond a reasonable doubt..." (Id. at 443 U.S. 313, 61 L. Ed. 2d at 569).

In Jackson v. Virginia, supra, the Supreme Court made it abundantly clear that it was rejecting the "no evidence" rule of Thompson v. Louisville, supra, and was adopting the rationale of In Re Winship, supra, namely that every element of the crime has been established beyond a reasonable doubt (Jackson v. Virginia, 443 U.S. at 314, 61 L. Ed. 2d at 570).

As the Supreme Court explained in Jackson v. Virginia, supra, (id.):

> "The Court in Thompson explicitly stated that the due process right at issue did not concern a question of evidentiary 'sufficiency'. 362 U.S. at 199...The right established in In Re Winship, however, clearly stands on a different footing. Winship involved an adjudication of juvenile delinquency made by a judge under a state statute providing that the prosecution must prove the conduct charged as delinquent - which in Winship would have been a criminal offense if engaged in by an adult - by a preponderance of the evidence. Applying that standard, the judge was satisfied that the juvenile was 'guilty', but he noted that the result might well have been different under a standard of proof beyond a reasonable doubt. In short, the record in Winship was not totally devoid of evidence of guilt."

The Supreme Court of the United States continued explaining as follows (id.):

> "The constitutional problem addressed in Winship was thus

> distinct from the stark problem of arbitrariness presented in Thompson v. Louisville. In Winship, the Court held for the first time that Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' 397 U.S. at 364... In so holding, the Court emphasized that proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability...358-362, 25 L. Ed. 2d 368 ... See Davis v. United States, 160 U.S. 469 ... Brinegar v. United States, 338 U.S. 160 ... Leland v. Oregon, 343 U.S. 790 ... 9 J. Wigmore, Evidence §2495, pp. 307-308 (3d Ed. 1040)."

The Supreme Court of the United States thus has made it abundantly clear that the standard of "any evidence" has been decisively rejected. In Jackson v. Virginia, therefore, the Court continued, by proclaiming

(id.):

> "The standard of proof beyond a reasonable doubt, said the Court, 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to insure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S. 363, 25 L. Ed. 2d 368 ... At the same time, by impressing upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. Id., at 372, 25 L. Ed. 2d 368 ... (Harlan, J., concurring)."

In Jackson v. Virginia, the leading case on this subject, the Supreme Court noted that the constitutional standard recognized in the Winship case was expressly phrased as "... one that protects an accused against a conviction except on 'proof beyond a reason-

able doubt ...'. In subsequent cases discussing the reasonable doubt standard, we have never departed from the definition of the rule or from the Winship understanding of the central purposes it serves. See e.g. Ivan V. v. City of New York, 407 U.S. 203, 204 ...; Lego v. Twomey, 404 U.S. 477, 486-487...; Mullaney v. Wilbur, 421 U.S. 684, ...; Patterson v. New York, 432 U.S. 197...; Cool v. United States, 409 U.S. 100, 104..." (443 U.S. at 316, 61 L. Ed. 2d at 571).

Thus, the United States Supreme Court has made it unmistakably obvious that the Winship case "...presupposes an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a

Trier of Fact beyond a reasonable doubt of the existence of every element of the offense." (Id. 443 U.S. at 316, 61 L. Ed. 2d at 571 - emphasis ours).

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. A "reasonable doubt", at a minimum, is one based upon "reason".

A "reasonable doubt" has often been described as one "based on reason which arises from the evidence or lack of evidence." [Johnson v. Louisiana, 406 U.S. 356, 360, 32 L. Ed. 2d 152 (citing cases).]

Yet, a properly instructed jury may occasionally convict even when it can be said

that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.

In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. (Glasser v. United States, 315 U.S. 60, 80, 86 L. Ed. 680; Bronston v. United States, 409 U.S. 352, 34 L. Ed. 2d 568, see also, e.g., Curley v. United States, D.C. Cir., 160 F. 2d 229, 232, 233).

Thus, in view of In Re Winship, supra, which has established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it now follows that when such a conviction occurs in a state court trial, it cannot constitutionally stand. (Jackson v. Virginia, supra, 443 U.S.

317, 318, 61 L. Ed. 2d 560, 572).

Thus, this Court has observed in Jackson v. Virginia, supra, (id.), that a federal court "has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." (See Blackburn v. Alabama, 361 U.S. 199, 205-210, 4 L. Ed. 2d 242; cf. Drope v. Missouri, 420 U.S. 162, 174-175, and n. 10, 43 L. Ed. 2d 103).

The same duty obtains in federal habeas corpus, of course. (See Townsend v. Sain, 372 U.S. 293, 318, 9 L. Ed. 2d 770; Brown v. Allen, 344 U.S. 443, 506, 507).

Thus, after Winship, supra, the Supreme Court in Jackson v. Virginia, supra, declared that the critical inquiry are on review of the sufficiency of the evidence to support a criminal conviction must not simply be to

determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. Or, to put it another way, the relevant question is, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Johnson v. Louisiana, 406 U.S. at 362, 32 L. Ed. 2d 162).

In the case at bar, therefore, we maintain that the testimony was so threadbare and gossamer as to constitute insufficient evidence. We maintain that the two young children who testified, Greg Gutierrez and Todd Burney, were so inconsistent between themselves and were contradicted by other witnesses, that viewing it in the light most

favorable to the prosecution, it was not sufficient to have warranted a jury in returning a verdict of guilty beyond a reasonable doubt.

Under that criterion then, and under Jackson v. Virginia, supra, and the line of cases we have cited, we maintain that this Court should review this case and reverse.

II.

ERROR WAS CREATED AND PREJUDICE FLOWED TO THE PETITIONER WHEN THE TRIAL COURT PERMITTED THE INTRODUCTION OF EVIDENCE AS TO AN ALLEGED OTHER CRIME WHICH HAD ABSOLUTELY NOTHING TO DO WITH THE CHARGES HEREIN AND AGAINST WHICH THE PETITIONER HAD NO RIGHT OR OPPORTUNITY TO DEFEND PROPERLY.

When the petitioner took the stand in his own defense, the prosecution brought out that the petitioner was allegedly on total disability. It introduced evidence having

to show that the defendant-petitioner was actually working on certain projects at the time he was supposedly totally disabled.

This, of course, was not a charge in the indictment and it did not negate the fact that he was totally disabled. Totally disabled, of course, may very well mean inability to perform the job which petitioner had at the time that he was considered disabled.

Be that as it may, a motion for a mistrial was made and denied. We believe that this was highly prejudicial because of the fact that there was nothing in the indictment herein to suggest any other crimes with which petitioner was involved and, moreover, we do not believe that the charges of working while supposedly disabled had a proper role in this case, even for the purpose of

impeaching credibility. It would have required a wholly collateral trial to determine whether or not this work constituted "work" within the meaning of totally disabled.

We maintain therefore that the petitioner was severely prejudiced by the introduction of this evidence.

It is axiomatic that a conviction upon a charge not made, or upon a charge not tried, constitutes a denial of due process. (Cole v. Arkansas, 333 U.S. 196, 201, 92 L. Ed. 644; Presnell v. Georgia, 439 U.S. 14, 58 L. Ed. 2d 207).

In Jackson v. Virginia, supra, these standards no more than reflect a broader premise that has never been doubted in our constitutional system:

> "That a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. E.g., HOVEY v. ELLIOTT, 167 U.S. 409, 416-420, ... cf. BODDIE v. CONNECTICUT, 401 U.S. 371, 377-379..."

A meaningful opportunity to defend if not the right to a trial itself, presupposes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. "Accordingly, we have held, in the THOMPSON case, that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm." (Jackson v. Virginia, 433 U.S. at 314, 61 L. Ed. 2d at 570).

See also, Vachon v. New Hampshire, 414 U.S. 478, 38 L. Ed. 2d 666; Adderley v. Florida, 385 U.S. 39, 17 L. Ed. 2d 149;

Gregory v. Chicago, 394 U.S. 111, 22 L. Ed. 2d 134; and, Douglas v. Buder, 412 U.S. 430, 37 L. Ed. 2d 52.

Under the circumstances, for this reason, too, the judgments of the courts below should be reversed and this writ of certiorari should be granted.

CONCLUSION

The writ of certiorari should be granted and the convictions vacated.

Respectfully submitted,

s/ Irving Anolik
IRVING ANOLIK
Attorney for Petitioner

ORDER DENYING LEAVE TO APPEAL

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

April 11, 1985

John P. Lawler, Esq.
21 South Sixth Street
Stroudsburg, Pa. 18360

Re: Peter Wivorkoski,Petitioner v.
Commonwealth No. 777 E.D.
Allocatur Docket 1984

Dear Mr. Lawler:

This is to advise you that the following order has been endorsed on the Petition for Allowance of Appeal filed in the above-captioned matter:

March 29, 1985
PETITION DENIED.
Per curiam

Very truly yours,

s/ Marlene F. Lachman
Marlene F. Lachman, Esq.
Prothonotary

MFL:ejh
cc: James F. Marsh, Esq.

JUDGMENT DATED OCTOBER 12, 1984

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 01445 Philadelphia, 1983

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

PETER WIVORKOSKI,
Appellant.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Monroe County be, and the same is hereby AFFIRMED.

By the Court:

s/ J. Haniel Henry
J. Haniel Henry
Prothonotary

Dated: October 12, 1984

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 01445 Philadelphia, 1983

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

PETER WIVORKOSKI,

Appellant.

Appeal from Judgment of Sentence, Court of Common Pleas, Criminal Division, Monroe County, No. 79 of 1982

BEFORE: CAVANAUGH, BECK and TAMILIA, JJ.

PER CURIAM:

Judgment of sentence affirmed.

FILED OCT 12 1984

MEMORANDUM OPINION

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 01445 Philadelphia, 1983

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

PETER WIVORKOSKI,

Appellant.

Appeal from Judgment of Sentence, Court of Common Pleas, Criminal Division, Monroe County, No. 79 of 1982

BEFORE: CAVANAUGH, BECK and TAMILIA, JJ.

MEMORANDUM:

This is an appeal from a Judgment of Sentence imposed upon appellant, Peter Wivorkoski, as a consequence of his conviction on two counts of corruption of a minor, indecent assault and one count of involuntary deviate sexual intercourse. Post-trial mo-

tions were filed and denied. Appellant was fined and sentenced from three (3) to twenty-three (23) months imprisonment. Appellant then perfected the instant appeal.

Appellant contends that the court below erred in not declaring a mistrial. Specifically, appellant argues that he was prejudiced by testimony elicited by the prosecution from a witness who testified regarding prior acts of misconduct on behalf of appellant.

We have thoroughly reviewed the arguments and the applicable law and we conclude that the court below has properly disposed of this contention.

Accordingly, judgment of sentence affirmed.

OPINION AND ORDER DATED APRIL 15, 1983

IN THE COURT OF COMMON PLEAS OF THE 43RD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA
MONROE COUNTY BRANCH -- CRIMINAL

NO. 79 - 1982 CRIMINAL

CORRUPTION OF MINORS,
INDECENT ASSAULT

NO. 80 - 1982 CRIMINAL

INDECENT EXPOSURE,
INDECENT ASSAULT,
CORRUPTION OF MINORS,
INVOLUNTARY DEVIATE
SEXUAL INTERCOURSE

COMMONWEALTH OF PENNSYLVANIA,

PLAINTIFF

VS.

PETER WIVORKOSKI,

DEFENDANT

O P I N I O N

On Thursday, May 13, 1982, the Defendant, Peter Wivorkoski, was convicted at a jury trial before this Court on two counts of corruption of minors, 18 Pa. C.S.A.

§6301, two counts of indecent assault, 18 Pa. C.S.A. §3126, and one count of involuntary deviate sexual intercourse, 18 Pa. C.S.A. §3123. On May 19, 1982, Defendant, by his counsel, filed timely post-trial motions for a new trial and in arrest of judgment, pursuant to Pa.R.Crim.P. 1123. After careful consideration of these motions now before it, this Court concludes that they are without merit and affirms the judgments against Defendant.

Defendant submitted five post-trial motions:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is contrary to law.

4. The trial court erred in overruling

defense counsel's objection regarding testimony elicited regarding Defendant's working while collecting disability payments.

5. The prosecutor introduced evidence of Defendant's working while collecting disability payments over defense counsel's objection. Said evidence was introduced solely to prejudice the Defendant in that it inferred that Defendant committed other crimes not related to those which were charged.

The first three points may be discussed together, since they raise a single issue: Could the jury have reached the verdict it did, taking into account all of the evidence presented at trial?

In reviewing the legality and propriety of a jury's verdict, several points must be

remembered. The evidence must be read in the light most favorable to the winner of the verdict. Commonwealth v. Edwards, 493 Pa. 281, 426 A.2d 550 (1981); Commonwealth v. Rose, 463 Pa. 264, 344 A.2d 824 (1975); Commonwealth v. LaRosa, 283 Pa. Super. 264, 423 A.2d 1247 (1980). All reasonable inferences must be drawn in favor of the verdict winner. Commonwealth v. Edwards, supra at 287; Commonwealth v. Contakos, 492 Pa. 465, 424 A.2d 1284 (1981). The jury may believe any witnesses it chooses to believe. Commonwealth v. Williams, 236 Pa. Super. 184, 345 A.2d 267 (1975). As was stated in Commonwealth v. Rose, supra at 267-68:

> "The test of sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth and drawing the proper inferences favorable

> to the Commonwealth, the trier of fact could reasonably have found that all of the elements of the crime had been established beyond a reasonable doubt."

So viewed, the facts in the case are as follows. The three families involved, the Burneys, the Gutierrezes and the Wivorkoskis, had been friends for many years. It was common for them to visit each other regularly. During the week of August 10-16, 1981, the Wivorkoskis were staying at the Gutierrez house in Saylorsburg. Twelve year old Greg Gutierrez testified that, each night that week, Defendant entered his room and played with his (Greg's) penis (N. T., pp. 35-38). Greg stated that he asked Defendant to stop but that Defendant went ahead and did it again.

During the last week in August, the

Wivorkoskis stayed at the Burney house in Brodheadsville. Todd Burney, also twelve years old at the time these events occurred, testified that, on one occasion during this visit, Defendant took him into one of the bathrooms, took off his (Todd's) pants, had oral sex with him, and then played with his penis (N.T., pp. 69-72).

During that same week, Defendant took Greg, Todd and a couple other boys to the movies in Stroudsburg two times. Each of these times, while in the car, Defendant and his son showed the other boys obscene books and magazines (N.T., pp. 40-42, 77-81).

This testimony is more than sufficient to sustain the conviction. It is true that Greg showed confusion about the dates when

these incidents happened. However, inconsistencies and uncertainties in testimony affect weight, not admissibility, and are for the jury to resolve and believe. Commonwealth v. Emmi, 290 Pa. Super. 86, 92, 434 A.2d 142 (1981). The jury was well within its rights and duties when it chose to believe the testimony given by the two boys. It was not required to believe it, but it was not required to disbelieve it, either.

Because of their youth, Greg and Todd are incapable of consenting to any form of sexual activity. It is clear, therefore, that their testimonies described unlawful and repulsive sexual activity on Defendant's part, within the statutory definitions of involuntary deviate sexual intercourse, in-

decent assault and corruption of minors. No actual corruption need be shown to sustain conviction, merely actions tending to corrupt a minor. 18 Pa.C.S.A. §6301.

The law and evidence are sufficient to support the judgment against Defendant. His first three assignments of error, therefore, are rejected.

Defendant's Points 4 and 5 raise a serious issue that has been litigated frequently in Pennsylvania; the extent to which the prosecution may impeach a defendant's testimony by showing past misconduct.

In Commonwealth v. Butler, 405 Pa. 36, 47, 173 A.2d 468 (1961), the court noted the reasons for allowing such evidence in rebuttal.

> "This rule of evidence is founded on common sense and logic. If a defendant offers himself as a person worthy of belief, the jury has the right to know what kind of man he is - to aid in assessing his credibility. His previous record is admissible for this purpose just the same as testimony of prior reputation for veracity is evidence for the jury's consideration."

In Commonwealth v. Bighum, 452 Pa. 554, 566, 307 A.2d 255 (1973), the court, while not disapproving Commonwealth v. Butler, supra, recognized its problems.

> "While admittedly the state has a legitimate interest to serve in showing that a defendant-witness is not worthy of belief, we cannot be unmindful of the tendency of a normal juror to accept testimony of prior convictions as a basis for finding a predisposition to commit the crime charged."

The court proceeded to limit the use of such crimes to those with inherent dishonesty

or false statement, the age of such crimes, the extent of the criminal record, and the need for defendant to testify. Commonwealth v. Bighum, supra at 566-67, citing with approval Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

The general rule now is that evidence of past misconduct may not be introduced by the Commonwealth. Commonwealth v. Ulatoski, 472 Pa. 53, 371 A.2d 186 (1977). There are two noteworthy exceptions to this rule: the trial judge has the discretion to allow such evidence if relevant and not overly prejudicial, and the accused may be impeached as a witness by the introduction of evidence of past crimes involving dishonesty or false statement. Commonwealth v. Morris, 493 Pa. 164, 425 A.2d 715 (1981); Com-

monwealth v. Woods, 275 Pa. Super. 392, 402, 418 A.2d 1346 (1980).

In the case at bar, Defendant testified that he was on total disability compensation, and could not work at all, due to a back problem (N.T., p. 127). He also stated that at no time during the summer of 1981 had he done any work on aluminum siding (N.T., pp. 127-28). In rebuttal, the Commonwealth called Gerard Burney, who declared that he had seen Defendant working on aluminum siding at one point during the summer of 1981 (N.T., pp. 134-36). Defendant now claims that this was prejudicial in that it inevitably pointed the jurors toward the conclusion that Defendant was guilty of Workmen's Compensation fraud by his receipt of payments while able to work.

Defendant's argument misses the mark. "Total disability" is not merely a medical term. It involves a consideration of many factors, including a worker's training, experience, education, potential and job skills, along with the job market in his particular area of work. Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 891 (1967); Baker v. Oliver B. Cannon & Sons, Inc., 26 Pa. Cmwlth. 143, 362 A. 2d 1150 (1976). The general majority rule is that some work is not incompatible with a total disability claim. Spring v. Department of Labor and Industries of State, 640 P. 2d 1, 3 (Wash. 1982); 99 C.J.S. Workmen's Compensation §299 at 1054 (1958). This is the rule in Pennsylvania and New York. City of New Castle v. Workmen's Compensation Appeal

Board, __Pa. Cmwlth.__, 441 A.2d 803 (1982); Janusz v. Kistler Instrument Corp, 62 A.D.2d 1128, 404 N.Y.S. 2d 454 (1978).

The rebuttal testimony, therefore, is entirely consistent with a claim for total disability Workmen's Compensation. It does not offer evidence that Defendant has committed a crime. Its only function would be to cast a cloud over Defendant's testimony by challenging a statement that he had made under oath. The credibility of a witness is always an issue in the trial. Commonwealth v. Holmes, 486 Pa. 415, 406 A.2d 510 (1979). The rebuttal testimony does not implicate Defendant in any wrongdoing, is relevant, and, therefore, is admissible.

Even assuming for purposes of argument that the rebuttal testimony did implicate Defendant in a crime, it still is admissible

under the standard of Commonwealth v. Bighum, supra. Workmen's Compensation fraud, by definition, is an offense involving dishonesty. It is a comparatively recent occurrence. Furthermore, defendant had no need to rely solely on his testimony. His wife and son gave exculpatory testimony that was at least as valuable. By testifying, defendant placed his credibility in issue. Commonwealth v. Oates, 448 Pa. 486, 490, 295 A.2d 337 (1972); Commonwealth v. Rumage, 359 Pa. 477, 487, 59 A.2d 65 (1948). The jury is entitled to believe any witness' testimony it finds credible, and may hear evidence that affects such credibility. Commonwealth v. Griffey, 453 Pa. 142, 307 A.2d 283 (1973); Commonwealth v. Williams, supra at 189. The rebuttal was evidence

that defendant had given untrustworthy testimony on one issue and, therefore, might have given untrustworthy testimony on other issues. Commonwealth v. Butler, supra; Commonwealth v. Clark, 280 Pa. Super. 1, 421 A.2d 374 (1980); Commonwealth v. Woods, supra at 402-03.

It also should be noted that the trial court did not let the evidence go before the jury without attempting to give the jury guidance. Even before the jury heard the evidence, the Court gave a cautionary limiting instruction on the purpose of the evidence (N.T., p. 132). The Court warned the jurors not to use the evidence except for evaluating Defendant's credibility as a witness. In the charge to the jury, the Court reiterated this principle, but only

as a general statement concerning credibility evidence. No specific mention was made of this testimony by Gerard Burney (N.T., pp. 164-65).

The instruction to the jury served to prepare jurors for receiving the testimony in a limited manner. It is not as if the Court was issuing a curative instruction and trying to undo damage. No damage had been done, and the jurors could be forewarned of any potential problems. This is what occurred. It cannot be presumed that jurors will ignore the instructions of the Court. Furthermore, by the final warning in the charge to the jury, the Court reimpressed the jurors as to the importance of limited consideration while not drawing unnecessary attention to the particular tes-

timony concerning the Defendant.

The cautionary instruction to the jury, therefore, headed off any prejudice to Defendant while permitting relevant evidence of his credibility to be considered.

This Court finds no merit in Defendant's Points 4 and 5 in his motion for new trial.

Having found no merit in Defendant's motion for a new trial, this Court hereby denies said motion.

O R D E R

AND NOW, April 15, 1983, the Defendant's motion for a new trial is hereby denied.

The Defendant is directed to appear for sentencing on Wednesday, May 25, 1983, at 9:30 a.m., in Court Room No. 3, Courthouse, Stroudsburg, Monroe County, Pennsylvania.

The Probation Office is directed to prepare a pre-sentence investigation.

By the Court,

s/ James R. Marsh
P.J.

CC: Probation Office
District Attorney
John P. Lawler, Esq.
Sheriff